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14 **UNITED STATES DISTRICT COURT**

15 **NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION**

16 MOHAMMED AZAD and DANIELLE
17 BUCKLEY, on behalf of themselves and
18 all others similarly situated,

19 Plaintiffs,

20 v.

21 TOKIO MARINE HCC - MEDICAL
22 INSURANCE SERVICES GROUP,
23 HEALTH INSURANCE INNOVATIONS,
24 INC., HCC LIFE INSURANCE
25 COMPANY, and CONSUMER
26 BENEFITS OF AMERICA,

27 Defendants.

28 Case No. 4:17-cv-00618-PJH

29 **DEFENDANT CONSUMER BENEFITS
30 OF AMERICA'S NOTICE OF
31 MOTION AND MOTION TO
32 DISMISS; MEMORANDUM OF
33 POINTS AND AUTHORITIES IN
34 SUPPORT THEREOF**

35 *[Filed concurrently with [Proposed]
36 Order]*

37 Date: May 24, 2017
38 Time: 9:00 a.m.
39 Courtroom: 3

40 **TO ALL PARTIES HEREIN AND THEIR RESPECTIVE COUNSEL
41 OF RECORD:**

42 **PLEASE TAKE NOTICE** that on May 24, 2017, at 9:00 a.m. in Courtroom
43 3, of the above-entitled Court located at 1301 Clay Street, Oakland, California
44 94612, Defendant CONSUMER BENEFITS OF AMERICA ("CBA") will and
45 hereby does move for an order dismissing Plaintiffs MOHAMMED AZAD and
46 DANIELLE BUCKLEY's ("Plaintiffs") Class Action Complaint, without leave to

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50 MOTION TO DISMISS

1 amend, for failure to state a claim upon which relief can be granted pursuant to Rule
 2 12(b)(6).

3 This Motion is made on the ground that Plaintiffs do not make a single
 4 allegation of wrongdoing by CBA in the entirety of the Class Action Complaint and
 5 thus do not state a claim against CBA upon which relief can be granted. This
 6 Motion will be based upon this Notice, the Memorandum of Points and Authorities
 7 set forth below, and such evidence and argument as may be presented at the hearing
 8 on this motion.

9 **MEMORANDUM OF POINTS AND AUTHORITIES**

10 **I. INTRODUCTION**

11 Plaintiffs filed their Class Action Complaint on February 7, 2017, alleging claims
 12 for relief for: (1) Violation of the California Unfair Competition Law, Cal. *Bus. & Prof.*
 13 *Code* §17200, *et seq*; (2) Violation of the California False Advertising Law, Cal. *Bus. &*
 14 *Prof. Code* §17500, *et seq.*; (3) Breach of Contract; (4) Breach of the Implied Duty of
 15 Good Faith and Fair Dealing; and (5) Unjust Enrichment. Plaintiffs' Class Action
 16 Complaint states explicitly that CBA merely “[offers] discount services and benefits to
 17 group members.” (See Plaintiffs’ Complaint, ¶ 7). As set forth more fully below, CBA
 18 did not issue, advertise, market, sell, administer, or in any way otherwise engage in any
 19 activity relating to the provision of health insurance or the adjustment or denial of health
 20 insurance claims relating to Plaintiffs or any other of the purported Class Members
 21 involved in this litigation.

22 **II. STATEMENT OF RELEVANT FACTS**

23 Plaintiffs’ claim centers on the advertising and marketing of short term health
 24 insurance policies to individuals as well as the adjustment and handling of claims relating
 25 to that insurance. Specifically, Plaintiffs state the nature of their class action is to
 26 “challenge a common course of conduct by Defendants in their marketing and issuance of
 27 health insurance policies, and their claims processing, administration, customer service
 28 thereunder.” (See Plaintiffs’ Class Action Complaint, ¶ 2). Plaintiffs go on to state in their
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1 Class Action Complaint, “Defendants issue, market, and administer healthcare policies ...
 2 [and] Defendants market the policies in a misleading manner.” (*See* Plaintiffs’ Class
 3 Action Complaint, ¶ 3).

4 Plaintiffs do not, however, set forth any allegations that CBA ever issued or
 5 marketed health insurance policies or was involved in claims processing, administration, or
 6 customer service. In fact, the only references in Plaintiffs’ Class Action Complaint relating
 7 to CBA are set forth in paragraphs 7, 18, and 57. Those paragraphs state as follows:

8 Defendant Consumer Benefits of America (“CBA”) claims to
 9 offer discount services and benefits to group members, and has
 10 its principal place of business at 3190 Union Street, Lakewood,
 Colorado 80215.

11 (*See* Plaintiffs’ Class Action Complaint, ¶ 7).

12
 13 Defendant CBA purports to be an organization devoted to
 14 “providing quality discount services and benefits to its
 15 members for 30 Years (*sic*). ... CBA utilizes group buying
 16 power to negotiate the best services and prices for you, our
 17 members.” CBA’s website states that not only is it “committed
 18 to saving members money on everyday items like restaurants
 19 and movie tickets,” it can also “help you protect yourself and
 20 your family in the event an accidental injury should happen.”
 However, the “benefits” listed on the website relate only to
 legal care, online dining certificates, online fitness and
 nutrition, movie ticket savings, theme park discounts, discount
 tires and rims, budget truck rental, discount magazines, and a
 quarterly online newsletter.”

21
 22 (*See* Plaintiffs’ Class Action Complaint, ¶ 18). (Internal
 citations omitted.).

23
 24 Finally, in yet another effort to insulate their unlawful and
 25 unfair conduct from the full reach of the law, Defendants work
 26 with CBA in providing short-term insurance plans to
 27 consumers. HCC’s application form instructs the applicant that
 28 the insurance sought is “issued to the Consumer Benefits of
 America Association and underwritten by HCC Life Insurance
 Company.” This is because HCC wishes to sell its insurance

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1 product as a group product, instead of an individual product
 2 subject to more stringent consumer protection regulation. CBA
 3 charges dues of \$12 a month, and has no meaningful
 membership restrictions.

4 (See Plaintiffs' Class Action Complaint, ¶ 57).

5 **III. ARGUMENT**

6 **A. Plaintiffs Cannot State a Claim Against CBA**

7 A motion to dismiss under F. R. Civ. P. 12(b)(6) motion tests the legal sufficiency
 8 of the claims stated in a complaint. Dismissal of a claim pursuant to Rule 12(b)(6) is
 9 proper where there is either a "lack of a cognizable legal theory" or "the absence of
 10 sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police*
 11 *Department* (9th Cir. 1990) 901 F.2d 696, 699. A complaint survives a motion to dismiss
 12 only if it contains "enough facts to state a claim to relief that is plausible on its face." *Bell*
 13 *Atl. Corp. v. Twombly* (2007) 550 U.S. 544, 570.

14 Other than the three set forth in full above, there are no other references to CBA in
 15 the entirety of Plaintiffs' 30-page and 146 paragraph pleading. Further, of the three
 16 references to CBA outlined above, none of those references sets forth any charging
 17 allegations identifying the acts or omissions allegedly made or omitted to be made by CBA
 18 to support Plaintiffs' claims for relief against it. There are no allegations setting forth any
 19 alleged wrongdoing on the part of CBA in Plaintiff's entire Class Action Complaint.

20 Simply put, Plaintiffs do not state a claim against CBA. Accordingly, Plaintiffs
 21 have not stated any of the claims set forth in their Class Action Complaint for relief
 22 against CBA and CBA's Motion to Dismiss pursuant to Rule 12(b)(6) should be granted.

23 **1. Plaintiffs Cannot State a Claim Against CBA for Violation of**
 24 ***California Business & Professions Code §17200, et seq.***

25 To succeed on a claim under California *Business & Professions Code* 17200
 26 ("UCL"), a party must show that the defendant engaged in business practices that were: (1)
 27 unlawful, (2) fraudulent, or (3) unfair. The "unlawful" prong borrows violations from

1 other laws and makes them independently actionable. *Cel-Tech Comm., Inc. v. Los
2 Angeles Cellular Tel. Co.* (1999) 20 Cal.4th 163, 180.

3 To establish “fraudulent” conduct, a defendant must be engaged in conduct likely to
4 deceive a reasonable consumer. *In re Tobacco II Cases* (2009) 46 Cal.4th 298, 312
5 (explaining it is necessary to show that “members of the public are likely to be deceived”);
6 *Consumer Advocates v. Echostar Satellite Corp.* (2003) 113 Cal.App.4th 1351, 1360
7 (“[U]nless the advertisements targets a particular disadvantaged or vulnerable group, it is
8 judged by the effect it would have on a reasonable consumer”).

9 Plaintiffs make no allegations of fraud against CBA. Under the Federal Rules of
10 Civil Procedure, “[i]n alleging fraud . . . , a party must state with particularity the
11 circumstances constituting fraud.... Malice, intent, knowledge, and other conditions of a
12 person’s mind may be alleged generally.” See F.R.C.P., Rule 9(b). “Under Rule 9(b), the
13 complaint must allege specific facts regarding the fraudulent activity, such as the time,
14 date, place, and content of the alleged fraudulent representation, how or why the
15 representation was false or misleading, and in some cases, the identity of the person
16 engaged in the fraud.” *Rubke v. Capitol Bancorp* (N.D. Cal. 2006) 2006 U.S. Dist. LEXIS
17 4374 at *10. Moreover, “[b]ecause the plaintiff must set forth what is false or misleading
18 about a particular statement, he must do more than simply allege the neutral facts
19 necessary to identify the transaction; he must also explain why the disputed statement was
20 untrue or misleading at the time it was made.” *Id.*

21 Finally, there are generally two tests for establishing unfair conduct. The first: to
22 prove defendant engaged in “unfair” business practices, plaintiff must established that
23 defendant’s conduct “offends an established public policy or . . . [was] immoral,
24 unethical, oppressive, unscrupulous or substantially injurious to consumers.” *Smith v.*
25 *State Farm Mutual Automobile Ins., Co.* (2001) 93 Cal.App.4th 700, 719. The second test:
26 whether the conduct violates constitutional, statutory or regulatory provisions. *Bardin v.*
27 *DaimlerChrysler Corp.* (2006) 136 Cal.App.4th 1255, 1272-73.

28

1 Here, Plaintiffs' claim for relief against CBA and other defendants is predicated on
 2 an alleged violation of California *Insurance Code* § 332. (See Plaintiffs' Class Action
 3 Complaint, ¶ 94). As stated, however, CBA is not an insurance company and Plaintiffs
 4 make no allegation asserting it is. Accordingly, Plaintiffs' Class Action Complaint does
 5 not and cannot set forth any allegations against CBA for violation of *Insurance Code* § 332
 6 or any other statute relating to any alleged conduct relating to the issuance or
 7 administration of health insurance contracts or administration of claims when CBA is not
 8 an insurer and did not advertise, market, issue, or administer in any way the group health
 9 insurance program offered by HCC to CBA's members at issue in this action. Plaintiffs
 10 also have not and cannot set forth any allegations that any conduct by CBA was fraudulent
 11 or unfair as defined by the parameters set forth above. Accordingly, Plaintiffs' claim for
 12 relief pursuant to *Business & Professions Code* §17200 *et seq.* fails against CBA and
 13 CBA's motion to dismiss should be granted without leave to amend.

14 **2. Plaintiffs Cannot State a Claim Against CBA for Violation of**
 15 **California *Business & Professions Code* §17500, *et seq.***

16 California *Business and Professions Code* §17500 makes it unlawful for a person or
 17 entity to make certain false or misleading statements in the sale of real or personal property
 18 or services. Specifically, *Business and Professions Code* §17500 provides, in relevant
 19 part:

20 It is unlawful for any person, firm, corporation or association,
 21 or any employee thereof with intent directly or indirectly to
 22 dispose of real or personal property or to perform services,
 23 professional or otherwise, or anything of any nature
 24 whatsoever or to induce the public to enter into any obligation
 25 relating thereto, **to make or disseminate or cause to be made**
 26 **or disseminated** before the public in this state, or to make or
 27 disseminate or cause to be made or disseminated from this state
 28 before the public in any state, in any newspaper or other
 publication, or any advertising device, or by public outcry or
 proclamation, or in any other manner or means whatever,
 including over the Internet, **any statement, concerning that**
real or personal property or those services, professional or
otherwise, or concerning any circumstance or matter of
fact connected with the proposed performance or
disposition thereof, which is untrue or misleading, and
which is known, or which by the exercise of reasonable care

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1 **should be known, to be untrue or misleading,** or for any
 2 person, firm, or corporation to so make or disseminate or cause
 3 to be so made or disseminated any such statement as part of a
 4 plan or scheme with the intent not to sell that personal property
 5 or those services, professional or otherwise, so advertised at the
 6 price stated therein, or as so advertised. (Emphasis added.)
 7

8 Given that Section 17500 involves false advertising, logically the first element of
 9 establishing a violation of Section 17500 is identifying the alleged advertisement which is
 10 “untrue or misleading.” Here, however, Plaintiffs put forth no allegations CBA ever
 11 advertised or marketed in any way the group health insurance program offered by HCC to
 12 CBA’s members. Without an advertisement of any kind, Plaintiffs have not and cannot
 13 establish a claim for relief for an alleged violation of Section 17500 and this motion to
 14 dismiss should be granted without leave to amend.

15 **3. Plaintiffs Cannot State a Claim Against CBA for Breach of
 16 Contract**

17 A claim for Breach of Contract requires a showing that: (1) there was a contract;
 18 (2) plaintiff performed or was excused; (3) defendant breached the contract; and (4) the
 19 plaintiff was harmed. *Careau v. Security Pacific* (1990) 222 Cal.App.3d 1371. A contract
 20 is an agreement to do or not to do a certain thing. California *Civil Code* § 1549.
 21

22 The only contracts plead in Plaintiffs’ Class Action Complaint are the health
 23 insurance policies issued to Plaintiffs by HCC. Specifically, Plaintiffs’ Class Action
 24 Complaint alleges, “[t]he policies that Defendants sold Plaintiffs, combined with the
 25 timely payment of premiums amounted to legally enforceable promises and obligations
 26 owed via contract.” (See Plaintiffs’ Class Action Complaint, ¶ 118). In California,
 27 insurance policies are treated as contracts. *Solomon v. Union Oil of California* (1940) 16
 28 Cal.2d 229, 237; California *Insurance Code* § 22.

29 There are no allegations in the Class Action Complaint, however, identifying any
 30 contract between Plaintiffs and CBA. Plaintiffs cannot state a claim for breach of contract
 31 against CBA if CBA was never a party to any contract with Plaintiffs. Accordingly,
 32

1 Plaintiffs' third claim for relief against CBA fails and the instant motion to dismiss should
 2 be granted without leave to amend.

3 **4. Plaintiffs Cannot State a Claim Against CBA for Breach of the**
 Implied Covenant of Good Faith and Fair Dealing

5 A claim of Breach of the Implied Covenant of Good Faith or Fair Dealing arising
 6 out of an insurance contract has two requirements: (1) benefits due under the policy are
 7 withheld; and (2) the reason for withholding benefits must have been unreasonable. *Love*
 8 *v. Fire Insurance Exchange* (1990) 221 Cal.App.3d 1136, 1151-52. In *Waller v. Truck Ins.*
 9 *Exchange* (1995) 11 Cal.4th 1, the California Supreme Court agreed that there is no cause
 10 of action for breach of the covenant of good faith and fair dealing if the insured is owed no
 11 duties under the contract – the covenant is based on the contractual relationship and only
 12 implied as a supplement to the express contractual covenants. *Id.* at 36. Plaintiffs' Class
 13 Action Complaint describes their claim against Defendants as follows; "Defendants
 14 unreasonably denied Plaintiffs coverage for care that was covered under their insurance
 15 policies." (See Plaintiffs' Class Action Complaint, ¶ 130).

16 Here, however, as has been reiterated throughout this motion, CBA was not
 17 Plaintiffs' insurer and was not a party to the health insurance contracts between Plaintiffs
 18 and HCC. There are no allegations in the entirety of Plaintiffs' Class Action Complaint to
 19 the contrary. Because CBA was not a party to any of the health insurance contracts set
 20 forth in Plaintiffs' Class Action Complaint, it cannot be found to have violated them or to
 21 have breached the implied covenant of good faith and fair dealing in them, as a matter of
 22 law. It is axiomatic there can be no liability for breach of the implied covenant of good
 23 faith and fair dealing in the absence of a breach of contract. As Plaintiffs have not and
 24 cannot state a claim for breach of contract against CBA, so too their claim for relief for
 25 Breach of the Implied Covenant of Good Faith and Fair Dealing fails and this motion
 26 should be granted without leave to amend.

27 ///

28 ///

1 **5. Plaintiffs Cannot State a Claim Against CBA for Unjust
2 Enrichment**

3 Plaintiffs' fifth claim for relief for Unjust Enrichment is pleaded as an "alternative
4 to their claim for restitution under the UCL." (*See* Plaintiffs' Class Action Complaint, ¶
5 142). Plaintiffs specifically claim that,

6 Through their deceptive and unlawful actions, Defendants have
7 received monies from Plaintiffs and the Class Members that
8 they should not have, **in the form of higher premiums and
greater revenues** than they would have enjoyed had they acted
9 lawfully. In addition, **they were spared from spending
money they would have otherwise spent** that Plaintiffs had to
pay out of pocket.

10 (*See* Plaintiffs' Class Action Complaint, ¶ 143). (Emphasis added.)

11 "Unjust enrichment is not a cause of action, ... or even a remedy, but rather 'a
12 general principle, underlying various legal doctrines and remedies.' It is synonymous with
13 restitution." *Bank of N.Y. Mellon v. Citibank, N.A.* (2017) 8 Cal. App. 5th 935, 955. The
14 person or entity receiving the benefit is required to make restitution only if the
15 circumstances are such that, as between the two, it is unjust for the person or entity to
16 retain it. *See Meister v. Mensinger*, (2014) 230 Cal. App. 4th 381, 398.

17 Here, Plaintiffs have set forth no allegations CBA ever received any premiums for
18 the health insurance products purchased by Plaintiffs from HCC. Accordingly, CBA was
19 not the recipient of any benefit from Plaintiffs relating to their health insurance claims.
20 Plaintiffs have not and cannot allege any facts to support their claim for Unjust Enrichment
21 against CBA. Plaintiffs claim for relief further fails as there is no such cognizable cause of
22 action in California. Based on the foregoing, this motion to dismiss should be granted in
23 favor of CBA without leave to amend.

24 ///

25 ///

26 ///

27 ///

28 ///

IV. CONCLUSION

Based on the foregoing, CBA has not and cannot allege any facts to support any of its claims for relief against CBA. Accordingly, CBA respectfully requests that the Court dismiss the instant action against CBA without leave to amend.

Respectfully submitted,

Dated: April 14, 2017

HAIGHT BROWN & BONESTEEL LLP

By: _____ /s/

David W. Evans
Howard M. Garfield
Renata L. Hoddinott
Attorneys for Defendant CONSUMER
BENEFITS OF AMERICA

Haight

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

Azad, et al. v. Tokio Marine HCC-Medical Insurance Services Group, et al.
USDC-Northern District Case No. 4:17-cv-00618-PJH

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of San Francisco, State of California. My business address is Three Embarcadero Center, Suite 200, San Francisco, CA 94111.

On April 14, 2017, I served true copies of the following document(s) described as:

**DEFENDANT CONSUMER BENEFITS OF AMERICA'S NOTICE OF
MOTION AND MOTION TO DISMISS; MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF**

[X] BY CM/ECF NOTICE OF ELECTRONIC FILING: I electronically filed the document(s) with the Clerk of the Court by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. Participants in the case who are not registered CM/ECF users will be served by mail or by other means permitted by the court rules.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 14, 2017, at San Francisco, California.


Paula M. Johnson